STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

CERTIORARI TO DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein, Circuit Court Judge
Case No. 2009-CP-18-1636

JONATHAN COBURN,..... PETITIONER,

v.

STATE OF SOUTH CAROLINA,.....RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does evidence support the PCR court's determination Petitioner did not carry his burden of demonstrating ineffective assistance of counsel based on alleged misadvice regarding parole eligibility?

STATEMENT OF THE CASE

Jonathan Coburn ("Petitioner") was indicted for Murder (2007-GS-18-0163) and Assault and Battery with Intent to Kill ("ABWIK") (2007-GS-18-0164). Petitioner was represented by Timothy Clay Kulp, Esquire. On July 14, 2008, the Petitioner pled guilty without negotiations or recommendations before the Honorable Paul M. Burch, and sentencing was deferred. On July 17, 2008, Applicant was sentenced to thirty (30) years imprisonment for Murder and to twenty (20) years imprisonment for ABWIK. The sentences were to be served concurrently. Applicant did not appeal his conviction and sentence.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "'any evidence' of probative value" exists to sustain the PCR judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, *but for*

counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial.

[Emphasis supplied.] Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

SUMMARY OF FACTS ADDUCED AT PLEA

Petitioner entered his guilty plea without negotiations or recommendations on July 14, 2008. Petitioner agreed to testify against co-defendant Vincent Payton ("Payton") at Payton's impending trial, and sentencing was deferred.

Pursuant to Petitioner's agreement to testify, a proffer of Petitioner's testimony was given at the plea. (App. p. 90, line 21 – p. 97, line 7.) In his proffer, Petitioner related the plan he and Payton had conceived to rob Melvin Bryant ("Bryant"), an acquaintance of Payton's. Petitioner telephoned Bryant, supplying the ruse that Payton was in jail and Petitioner would be paying off a drug debt for Payton. Petitioner and Bryant agreed to meet at the King's Grant golf course on Saturday. Petitioner and co-defendants proceeded to the planned rendezvous, he himself armed with a knife and knowing that there were rifles in the car. According to Petitioner, Payton had ordered Petitioner to cut Bryant's throat. However, Bryant never arrived on Saturday.

The following day, Petitioner and Payton renewed their efforts to rob Bryant. This time, Petitioner contacted a man named Gunther and procured a gun and a vehicle for use in the robbery. Petitioner, claiming to be acting at Payton's direction, again telephoned Bryant and renewed the meeting at King's Grant golf course. The plan was that Petitioner, armed with a loaded handgun, would "put the gun to [Bryant's] head and take everything, and then leave and go about our business." (App. p. 95, lines 9-11.) This time Bryant did appear at King's Grant, arriving as a passenger in a vehicle driven by a young woman named Lisa Thompson ("Lisa"). When Petitioner approached the vehicle, armed as planned, Petitioner stated, "I just – I fired into the car." (App. p. 95, line 23.) Petitioner reported that he intentionally fired the gun because he got scared (App. p. 97, lines 6-7) and that he only intended to rob Bryant but "just freaked out." (App. p. 110, lines 7-11.) Of Petitioner's two shots, one struck Lisa in the head, fatally wounding her. Bryant was only injured in the incident and survived to identify his assailants.

Petitioner and his co-defendants fled. Petitioner reported that he gave Payton the gun for disposal and stated that they parted on foot. Though Petitioner claimed in a written statement that he thought Bryant reached under the seat, Petitioner made no such claim at his plea.

ARGUMENT

There is evidence of probative value to support the PCR judge's finding that Petitioner failed to meet his burden of showing ineffective assistance of counsel based on misadvice regarding parole eligibility for several reasons:

1. **While hoping for a minimum sentence of thirty years, Petitioner understood that he could receive up to life imprisonment without parole for Murder alone. Therefore, any misadvice as to parole eligibility affected only the minimum sentence Petitioner faced. Petitioner understood the range of sentences up to life imprisonment without parole.**
2. **Even if Counsel erroneously advised that Petitioner could be eligible for parole while serving a Murder sentence, he also advised Petitioner that parole was not guaranteed and he could have to serve whatever sentence was imposed. Petitioner understood that, even if sentenced to a minimum term of thirty years, he could have to serve the entire term.**
3. **Petitioner failed to show that he relied on any misadvice such that he would not otherwise have entered a guilty plea but would have proceeded to trial.**

Petitioner claimed that Counsel misadvised him that he would be eligible for parole and "good time credits" while serving his sentence for Murder. Indeed, a person sentenced for the crime of Murder sentence is not "eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section." S.C. Code §16-3-20.

At PCR hearing, Counsel testified that he "mistakenly advised [Applicant] that he would be eligible [for parole] after service of 85 percent of his sentence." (App. p. 125, lines 24-25.) Counsel stated that "in the course of discussions regarding the plea and so forth, with my focus on, the focus being on avoiding [Applicant] being sentenced to life without parole, I overlooked that." (App. p. 126, lines 3-7.)

Interestingly, while Counsel testified that he gave Petitioner incorrect advice at the time of the plea, Counsel admitted that he pursued plea negotiations with the solicitor's office for a plea to Voluntary Manslaughter due to the potential parole eligibility with Voluntary Manslaughter as opposed to day-for-day service of a Murder sentence; the distinction in the two

offenses was implied as "something we both [Counsel and Solicitor] would know." (App. p. 162, line 19 – p. 163, line 11.) Counsel stated that he was "sure [he] knew" that a Murder sentence was served day-for-day, but Counsel stated that his primary focus leading up to the plea was the urgency to avoid a life sentence. (App. p. 164, lines 3-12.) The Solicitor also testified that:

> ...it is working knowledge of the people involved in criminal law that [Murder is] no parole, no good time credit. A 30-year sentence is a day-for-day sentence. Our conversations with [Counsel] never involved the range of voluntary from 2 to 30 years and was always allowing him to plead to voluntary for 30 years so that he would be eligible for parole after serving 85 percent of the sentence.

(App. p. 227, lines 4-11.)

Counsel testified that he informed Petitioner that when Petitioner became eligible for parole, the ultimate determination of whether he would actually be paroled was made by the "Department of Corrections based upon discipline and a host of other factors that one faces when seeking short term release." (App. p. 126, line 24 – p. 127, line 3.) Counsel explained to Petitioner that "85 percent parole" meant that there was no guarantee of early release but that there would be no way to do less than 85 percent of whatever sentence was levied. (App. p. 128, lines 1-5.) Counsel advised Petitioner could serve the entire thirty years. (App. p. 166, lines 12-19.)

As the PCR court found, if Counsel, in spite of demonstrating his knowledge of the parole eligibility associated with Murder and Voluntary Manslaughter in his discussions with the solicitor, advised Petitioner that he could be eligible for parole after service of 85% of the sentence, this advice was clearly incorrect. See for example Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (applicant need not be advised of collateral consequences such as parole, but if attorney actively misinforms the applicant must show reliance on the erroneous advice). The PCR court clearly doubted Counsel's professions of misadvice.

Moreover, the PCR court also correctly noted that even where an Applicant has proven deficient performance by counsel, he must still show "something more." Griffin v. State, 278 S.C. 620, 300 S.E.2d 482 (1983) (applicant failed to show he relied on misadvice regarding parole eligibility where applicant faced overwhelming evidence and agreed not to seek the death penalty if applicant pled guilty); Hunter v. State, 316 S.C. 105, 447 S.E.2d 203 (while misadvice from the bench could mislead a defendant to his detriment, it is wholly impractical to maintain a rule which requires automatic reversal of a plea without something more) (abrogated on other grounds by Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998)). An Applicant bears the burden of showing that but for counsel's alleged error, he *would not have pled guilty and would have insisted on going to trial.* Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 203 (1985). While this point may be satisfied by the applicant's testimony, it is still within the province of the court to determine the credibility of that testimony.

The PCR court set forth several points of evidence in determining that Petitioner's current claim that he relied solely on the promise of parole eligibility in deciding to enter his plea to lack credibility:

- The plea carried no negotiations or recommendations as to sentence. Petitioner acknowledged that he understood that his sentence could range from a minimum sentence of thirty years up to a life sentence as a result of his plea to Murder. (App. p. 87, lines 1-3; p. 206, line 24 – p. 207, line 7.) Petitioner even understood that the twenty year sentence for ABWIK could be consecutive. (PCR Tr. p. 192, lines 10-13.) Should the two be run consecutively, Petitioner faced a sentence in excess of life without parole. (App. p. 179, lines 11-17.) Therefore, Petitioner's misunderstanding regarding parole eligibility affected only the minimum sentence he believed would face. There is no evidence that he

was under any delusion about the possibility of receiving a sentence in excess of thirty years.

- As discussed above, even giving credence to Counsel's claims of misadvice, Counsel clearly advised that actually being paroled prior to the service of the entire sentence was not guaranteed. Therefore, Petitioner entered his plea with the understanding that he could serve the entire thirty year sentence if the minimum was actually imposed. While Petitioner may have labored under the hope of receiving the minimum sentence and being paroled, he understood life imprisonment was possible and that he may not be paroled even if he were to receive a sentence less than life. See Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (Wishful thinking does not equate with misapprehension as to sentence). Petitioner's self-serving assertion that he based his plea on a hope that would receive 25 years and 5 months would only be applicable to the minimum sentence, a sentence he was not assured of receiving, and even if he received it, he understood he may never be paroled. Therefore, it strains credulity to suggest that if he had been told that he was, not possibly but in fact, facing 30 years to life day-for-day (plus twenty years for ABWIK), Applicant would have decided against accepting the plea. See Roscoe v. State, 345 S.C. 16, 21, 546 S.E.2d 417, 419 (2001). Accord Manley v. United States, 588 F.2d 79, 82 (4th Cir.1978) (holding "a mistake of a few years in advice about the length of what would otherwise be a long term would not constitute ineffectiveness of counsel").
- Petitioner clearly wanted to minimize his sentence exposure in the face of overwhelming and disturbing factual evidence. It is clear from Counsel's advice, pursuit of a plea offer, and Applicant's understanding that all parties believed that this end would most likely be accomplished through a plea and testimony against Payton, not a trial. Petitioner faced evidence that Lisa was killed and Bryant injured during the course of an admitted armed

robbery, a robbery planned well in advance and executed again upon failure of the first attempt. In his proffer and plea statements, Petitioner abandoned his feeble claim at self-defense outlined in his written statement, and at PCR hearing, Applicant expressly denied a self-defense claim.[1] (App. p. 183, lines 3-7.) Counsel discussed various aspects of the case as it would likely play out at jury trial. (See for example App. p. 156, line 1 – p. 157, line 3; p. 176; pp. 180-181; p. 203 – 204, line 1.) Based on a thorough review, Counsel concluded that a plea was the most likely strategy to result in a sentence less than life imprisonment. (App. p. 165, line 12 – p. 166, line 11.) Counsel stated that the evidence was of concern to him in rendering his advice to plead guilty. (App. p. 186, lines 5-7.) Increasing the odds of avoiding a life sentence was paramount in Counsel's advice, and the decision was left to Petitioner following thorough discussion of the evidence and the limited avenues for defense.

Based on all the foregoing, the Respondent submits that the PCR correctly concluded that Petitioner failed to show that but for misadvice regarding parole eligibility Petitioner would not have pled guilty but would have insisted on a jury trial.

[1] Some jurisdictions have even precluded self-defense in the case of felony murder. See for example State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995); State v. Cooke, 89 Conn. App. 530, 874 A.2d 805 (2005); State v. Kirkpatrick, 184 P.3d 247 (Kan. 2008).

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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April 17, 2012

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PROOF OF SERVICE

I, Lauren Meara, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jim Brown, Esquire
Law Offices of Jim Brown
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I further certify that all parties required by Rule to be served have been served.

This 17th day of April, 2012.

Lauren Meara
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